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ABSTRACT

This paper examines what exactly an educational record is. The definition of educational record is central to how the provisions of the Family Educational Rights and Privacy Act (FERPA) are laid out. In order to gain FERPA protection, a document must be considered an educational record. To set context, the paper describes FERPA as an act stating that no funds are to be made available under any applicable program to any educational agency or institution that has a policy of denying, or effectively prevents, the parents of students who attended or do attend a school, the right to inspect and review the education records of their children. In this paper, an educational record is broadly defined to include records, files, documents, and other materials, which contain information directly related to a student and are maintained by an educational agency, institution, or by a person acting for such an agency or institution. A court case is discussed, in which the practice of teachers having students grade other students' assignments was questioned as a possible violation of FERPA. A court case involving the release of student disciplinary records and FERPA is also analyzed. (RT)

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FERPA: What Exactly is an Educational Record?

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FERPA: WHAT EXACTLY IS AN EDUCATIONAL RECORD?

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In light of the recent Supreme Court case, *Gonzaga University v. Doe*[1], school and college administrators have been breathing a sigh of relief. However, while there is no longer any real threat of individuals bringing suits against institutions for FERPA violations, the long-term impact of *Gonzaga* is yet to be seen. Colleges and schools should continue to comply with the Family Educational Rights & Privacy Act ("FERPA") as always because FERPA still requires compliance or the risk of loss of federal funding.

This paper will give a brief overview of FERPA followed by a discussion of what is an educational record centering on the recent Supreme Court case *Owasso Independent School District v. Falvo*, 122 S. Ct. 934 (2002).

I. WHAT IS FERPA

FERPA was enacted in 1974 to ensure (1) that parents of students, or students over the age of eighteen or attending an institution of post-secondary education, had access to their education records, and (2) to protect the student's right to privacy by limiting the transferability and disclosure of educational records without consent. FERPA is also known as the Buckley Amendment or the Buckley-Pell Amendment to the General Education Provisions Act. FERPA conditions the receipt of federal funding by educational institutions, on the institution's compliance with certain procedures. In order to gain FERPA protection, a document must be considered an "educational record."

FERPA is found at 20 U.S.C.A. § 1232g.

In pertinent part, FERPA states:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which

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[1] See materials prepared by co-presenter Ann Daggett for a full discussion on this case that held FERPA did not provide for a private right of action.

effectively prevents, the parents of students who are or have been in attendance at a school, at such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .

No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C.A. § 1232g(a)(1)(A), (2).

FERPA also requires that an educational institution comply with certain procedures when disclosing or releasing a student's educational records. FERPA states:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C.A. § 1232g(b)(1).

There are exceptions to this general rule and those include, among others, the right of the educational institution to release education records to other school officials who have been determined by the institution to have a legitimate educational interest in the records, state and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to state statute, accrediting organizations, and subject to regulations of the Secretary, and in connection with an emergency, appropriate persons when the knowledge is necessary to protect the health or safety of the student or other persons.
20 U.S.C.A. § 1232g(b)(1)(A)-(I).

Finally, FERPA states that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, . . . unless --
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, with a copy of the records to be released to the student's parents and the student if desired by the parents, or
> (B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution.

20 U.S.C.A. § 1232g(b)(2). In short, federal funds will be denied to an institution if it denies parents or students the right to inspect and review the educational records of their children, if the institution denies the parents or students an opportunity to challenge the information in the records, where the educational institution has a policy or practice of permitting the release of educational records without the written consent of the parents or the institution has a policy or practice of releasing or providing access to personally identifiable information in education records without written consent or without giving notice to the parents and students prior to complying with a judicial order or a lawfully issued subpoena.

FERPA was designed to protect an individual's privacy interest in information relating to his or her education. FERPA accomplishes this by limiting the transferability of education records without consent. If an institution feels it cannot comply it has a duty to notify the Department of Education. 34 CFR § 99.61.

II. WHAT IS AN EDUCATIONAL RECORD?

To come within the purview of FERPA, a document must be an "education record." FERPA defines an education record broadly to include those records, files, documents, and other materials, which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C.A. § 1232g.(a)(3)(A). The term "education record" does not include the following:

1. Records of instructional, supervisory and administrative personnel which are in the sole possession of the maker thereof and are not accessible or revealed to any other person except a substitute;

2. If law enforcement personnel do not have access to education records, the records and documents created by such law enforcement unit and are maintained solely for law enforcement purposes and are not made available to persons other than law enforcement officials of the same jurisdiction;

3. Records made and maintained in the normal course of business by an employee of an educational agency or institution which relate exclusively to such person in that person's capacity as an employee and are not available for any other purpose; and

4. Records on a student who is eighteen years of age or older, or one attending an institution of post-secondary education, which are made or maintained by a physician or other recognized professional which are made, maintained or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatments.

20 U.S.C.A. § 1232g(3)(B).

Also excluded from the definition of education record is "directory information," which includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of athletic team members, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C.A. § 1232g.(a)(5). If an institution makes directory information public, it is required to give notice to a student before doing so. 20 U.S.C.A. § 2132g.(a)(5)(B).

Numerous issues under FERPA have been litigated in the courts. One of these issues is what documents constitute educational records.

III. PEER GRADING AND FERPA

In 2001, we learned from *Osborne v. Board of Regents of the University of Wisconsin System*, 634 N.W.2d 563 (2001), that an education record includes those records that were maintained in a high school, university, or testing agency that were transferred to another university or educational institution for admission purposes. This definition broadened the scope of documents that constituted educational records because it included records of individuals who did not necessarily enroll at a university, but who made application thereto and had documents maintained by the person's high school or other educational institution transferred to the school at which the applicant was applying.

The import of this decision is that under the *Osborne* analysis, an educational institution faced with a records request would not only need to determine whether the record is requested of an individual who was or is enrolled at that institution, but also whether the records it maintains on an applicant who did not enroll were created and maintained by another educational institution or agency when the applicant was a student at that other educational institution or agency.

The issue of when a document is "maintained" was recently addressed in 2002 by the Supreme Court in *Owasso, infra.* In *Owasso*, the court held that peer grading did not violate FERPA. In the Owasso Independent School District, like many other school districts around the country, teachers employed a technique for grading assignments that required students to exchange papers and grade another classmate's assignment. Thus, at that point, at least one other student had access to educational information about a classmate. Ms. Falvo brought suit against the Owasso Independent School District claiming that this practice violated FERPA because the assignments passed among the classmates constituted educational records under FERPA and the disclosure of the grade without consent constituted a violation.

The Supreme Court noted that the assignments did contain information directly related to a student, but held that the assignments were not educational records under FERPA until they were maintained by the educational agency or institution. Because the papers, when being graded by classmates, were not "maintained" by the educational institution, the assignments did not constitute educational records. In relying on this decision, the court looked to the ordinary meaning of the word maintained which is to "keep in existence or continuance; preserve; retain." *Owasso*, 122 S. Ct. at 938, *citing* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE,

1160 (2nd Ed. 1987). The court did not decide, but rather assumed, that a teacher's grade book is an education record. Thus, it was not until the score on a student's graded assignment was contained therein that the grade became an education record.

The Supreme Court further noted that a student grader is not a person acting for an educational institution such that he or she could be considered to maintain the education record during the grading process. According to the Supreme Court, FERPA implies that education records are institutional records kept by a single central custodian such as a registrar, not individual assignments handled by many student graders in their separate classrooms. *Owasso*, 122 S. Ct. at 940.

Based on the Supreme Court' holding in *Owasso*, teachers may employ peer grading in their classrooms without worrying that they are violating FERPA. The *Owasso* holding limits the definition of educational record in that it does not include assignments being handled by classmates. The court did not decide whether, once the assignment was turned in to the teacher and was maintained by the teacher for the educational institution, the assignment became an educational record under the Act.

IV. DISCIPLINARY RECORDS AND FERPA

Subsequent to the Supreme Court decision in *Owasso*, the Sixth Circuit also issued a well-written decision regarding disciplinary records under FERPA and the interplay of a state open records act and the First Amendment when dealing with a request for disciplinary records. In *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Chronicle of Higher Education intervened to contest the District Court's grant of a permanent injunction prohibiting the university from producing disciplinary records. The Court concluded that disciplinary records were educational records under FERPA and that releasing such information would constitute a violation. This case stemmed from an earlier dispute between the University newspaper and administration. The Miami newspaper sought student disciplinary records from the University to track crime trends. Initially, the University refused to release the information but then the editors made a written records request pursuant to the Ohio Public Records Act. As a result, the University released the records. However, pursuant to FERPA's privacy provisions, the University redacted the identity, sex, and age of the accused as well as the date, time and locations of the incidents giving rise to the disciplinary charges. In a subsequent lawsuit brought by the newspaper, the Ohio Supreme Court determined that the disciplinary records were not

protected by FERPA and ordered the University to produce all the records requested by the editors - namely, the documents previously produced with redacting only the name, social security number or student I.D. of the accused or convicted party.

Subsequent to this decision, the Chronicle, pursuant to the Ohio Public Records Act, made written request to Miami University and Ohio State University for disciplinary records during 1995 and 1996. The Chronicle requested that the records be produced with names intact and minimal redaction. Upon receipt of this request, Miami University contacted the United States Department of Education ("DOE") and explained that it might not be able to comply with FERPA. The DOE's position was that the Ohio Supreme Court's ruling was incorrect and that disclosure of the student disciplinary records would be a violation of FERPA. Subsequent to these discussions the DOE filed suit against Miami University and Ohio State University seeking to prohibit them from disclosing the student disciplinary records containing personally identifiable information. The District Court granted the DOE's motion and permanently enjoined the universities from releasing student disciplinary records in violation of FERPA. It was at this point that the Chronicle intervened and appealed the decision. In ruling on the appeal, the Sixth Circuit analyzed the interplay between the Ohio Public Records Act which specifically recognized an exemption from its definition of public records for those the release of which is prohibited by federal law. This exception, the Sixth Circuit noted, clearly included FERPA's prohibition against disclosure of certain records. The Sixth Circuit then went on to determine that pursuant to FERPA's broad definition of education records, student disciplinary records were education records because they directly related to the student and were kept by the student's university.

The Chronicle argued that student disciplinary records involved criminal offenses that should be construed as unprotected law enforcement records. The Sixth Circuit disagreed with this argument, holding that disciplinary records were educational records under FERPA subject only to five exceptions to the Act which allow disclosure of disciplinary records to the alleged victim of the crime or those who have a legitimate educational interest in the student, when the student poses a significant risk of safety or well-being to himself or others. Other exceptions include disclosing the final results of disciplinary proceedings in certain instances or disclosing to the student's parent or legal guardian when the student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance. Finally, the court

noted that records maintained by law enforcement units created by that law enforcement unit for the purpose of law enforcement were also excluded from the definition of education records. However, the court found that the universities' disciplinary boards did not constitute law enforcement units and further stated that the disciplinary action or proceeding conducted by the educational institution and the records created therein were not those of a law enforcement unit.

Finally, the Chronicle argued that the prohibition violated their First Amendment rights. The Court determined that the rights of the students to privacy outweighed the First Amendment right asserted by the Chronicle because the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. The court determined that university disciplinary records were not made available on a regular basis and, thus, the First Amendment argument failed. Finally, the court noted that the Chronicle could still request student disciplinary records that did not contain personally identifiable information. Under such circumstances, the universities could provide the information to the Chronicle if this information was redacted.

III. CONCLUSION

Education records are broadly defined under FERPA. Unless an education record falls within the specific parameters of an exception identified in the Act, then it is in the educational institution's best interest to decline to produce the requested information and to keep it private.

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